IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID LLOYD,	)	
	)	Civil Action
Plaintiff	)	No. 02-CV-00830
	)	
vs.	)	
	)	
CITY OF BETHLEHEM and	)	
DANA B. GRUBB,	)	
	)	
Defendants	)	

* * *

APPEARANCES:
DONALD P. RUSSO, ESQUIRE
On behalf of Plaintiff

PAUL G. LEES, ESQUIRE
On behalf of Defendants

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

INTRODUCTION

This matter is before the court on Defendants, City of Bethlehem and Dana B. Grubb's Motion for Summary Judgment filed August 15, 2003. Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment was filed September 18, 2003. For the reasons expressed below, we grant in part and deny in part defendants' motion for summary judgment.

PROCEDURAL HISTORY

On February 19, 2002 plaintiff David Lloyd filed a Complaint. On April 29, 2002 defendants City of Bethlehem ("City") and Dana Grubb ("Grubb") filed a motion to dismiss. Subsequently, on May 24, 2002 plaintiff filed an Amended Complaint asserting five causes of action.

Count I of plaintiff's Amended Complaint asserts a federal cause of action pursuant to the Age Discrimination in Employment Act of 1967 ("ADEA").[1] Count II asserts a pendent state law cause of action pursuant to the Pennsylvania Whistleblower Law.[2] Count III asserts a state law cause of action for breach of implied contract. Count IV asserts a federal cause of action for retaliation pursuant to 42 U.S.C. § 1983 by virtue of an alleged violation of the First Amendment to the United States Constitution as the underlying basis of a Section 1983 claim. Finally, in Count V plaintiff brings a cause of action based upon Sections 955 and 962 of the Pennsylvania Human Relations Act.[3]

On June 7, 2002 defendants filed a motion to dismiss plaintiff's Amended Complaint. By Memorandum and Order dated

---

[1] 29 U.S.C. §§ 621-634.

[2] Act of December 12, 1986, P.L. 1559, No. 169, §§ 1-8, as amended, 43 P.S. §§ 1421-1428.

[3] Act of October 27, 1955, P.L. 744, No. 222, §§ 1-13, as amended, 43 P.S. §§ 951-963.

October 16, 2002 our colleague Senior United States District Judge Herbert J. Hutton[4] denied defendants' motion to dismiss.[5]

BACKGROUND

Based upon the pleadings, record papers, depositions, affidavits and exhibits, the pertinent facts are as follows. Plaintiff David B. Lloyd began working for the City of Bethlehem in 1972 as an ambulance driver. Subsequently, he worked his way up through the ranks. At the time of his forced resignation on August 22, 2001 plaintiff worked as the Director of Emergency Medical Services ("EMS") for the City. Plaintiff was replaced as EMS Director by Gordon Smith, a man nearly two years, nine months younger than plaintiff.

In September 2000 plaintiff attended a meeting with City administrators including defendant Grubb, Deputy Director of Community Development; Tony Hanna, Director of Community Development; and Jean Zweifel, Director of Human Resources, concerning personnel complaints in the EMS about plaintiff. What took place at this meeting is in dispute.

---

[4] At the time of his October 16, 2002 Memorandum and Order, Judge Hutton was an active United States District Judge. Since then, he has transferred to senior status.

[5] As noted in Judge Hutton's October 16, 2002 Memorandum and Order, plaintiff voluntarily dropped Count V (alleged violations of the Pennsylvania Human Relations Act) and agreed that the official capacity claim against defendant Dana Grubb merged into the claims against defendant City of Bethlehem. Thus, the remaining claims against defendant Grubb were claims against him in his individual capacity only. Moreover, plaintiff withdrew his claim for punitive damages against the City of Bethlehem.

Plaintiff contends that the meeting was informal and that he was told to be less intense with his personnel, but he was not given any specific direction or given any specific task. Defendants contend that the meeting was the first step in a policy of a progressive discipline utilized by the City.

In December 2000 plaintiff met again with the same administrators. Defendants contend that a number of additional complaints were brought to plaintiff's attention at this meeting. Plaintiff contends that it was another informal meeting and that he was not specifically disciplined or advised what was required of him to improve relations with his subordinates. Plaintiff characterized the two meetings as "strange and bizarre".

In October, 1999 plaintiff was interviewed for a newspaper article under the headline "Bethlehem EMS has a medical emergency". The article was published on October 19, 1999 in the Bethlehem edition of the Express Times. In that article, plaintiff was quoted as stating that Bethlehem's EMS was inadequately equipped and understaffed. Moreover, plaintiff reportedly said that he was only able to handle 90% of the calls and EMS was missing 500 calls a year. In the article, plaintiff questioned how a police or fire commissioner would feel if he could not respond to that many calls.

In July 2001 plaintiff was again interviewed by the press. In an article under the headline "Ambulance corps hanging

on for dear life", published July 14, 2001 in The Morning Call, an Allentown newspaper. Plaintiff was quoted as stating that the EMS division was approaching a crisis because it was losing people as a result of low pay and high work demands. Plaintiff also reportedly said that it may get much worse before it gets better.

Plaintiff was interviewed for The Morning Call article after he reported the same information during a meeting of the Bethlehem Board of Health. Plaintiff contends that defendants retaliated against him after the second article in violation of his First Amendment rights by forcing his resignation.

Plaintiff asserts that comments made by former Mayor Donald Cunningham evidence a bias against older people. At a speaking engagement at a Jaycee's convention, Mayor Cunningham (a man in his 30's) allegedly commented on how good it was to be interacting with people his own age. (Plaintiff is a man in his late 40's.) Plaintiff, who attended the Jaycee's convention as a presenter, further alleges that Mayor Cunningham commented on the benefits of having a younger workforce.

Plaintiff contends that prior to his termination, he inquired about a local newspaper article which indicated that the City was considering offering an early retirement package to its employees. Specifically, plaintiff asserts that one of the proposed options was that eligible employees who by the

combination of years of service plus their age attained 75 (Rule of 75) were going to be offered early retirement packages similar to those offered to former workers at the Bethlehem Steel plant.

Plaintiff asserts that his 29 years of service plus his age, qualified him for early retirement under the proposed plan. He contends that he spoke to Tony Hanna about the early retirement option. Plaintiff avers that Mr. Hanna told him, "Dave, no one under 50 will be offered any retirement package", or words to that effect. Plaintiff further asserts that in October 2001, after his termination, the City offered a Rule of 75 package to its employees, including those under 50 years of age. Plaintiff maintains that this is evidence of age bias against him.

Finally, plaintiff asserts that the City has a Personnel Manual which includes a progressive discipline policy. Plaintiff contends that he was not provided with progressive discipline. He argues that the Personnel Manual is an implied contract between the City and its employees, notwithstanding the doctrine of at-will-employment in Pennsylvania. Defendant contends its Personnel Manual is only advisory and is not an implied contract which supplanted plaintiff's status as an at-will employee.

Standard of Review

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Federal Home Loan Mortgage Corporation v. Scottsdale Insurance Company, 316 F.3d 431, 433 (3d Cir. 2003). Only facts that may affect the outcome of a case are “material”. Moreover, all reasonable inferences from the record are drawn in favor of the non-movant. Anderson, supra.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See Watson v. Eastman Kodak Company, 235 F.3d 851, 857-858 (3d Cir. 2000). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

Discussion

Age Discrimination Claim

An ADEA case is traditionally analyzed under the 3-step, burden shifting test established by the United States Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Fakete v. Aetna, Inc., 308 F.3d 335 (3d Cir. 2002). Under McDonnell Douglas and its progeny a plaintiff must initially establish a prima facie case of discrimination. Upon a prima facie showing, the burden shifts to the employer to produce a legitimate, non-discriminatory reason for the adverse employment action. After defendant has met its burden of production, the burden shifts back to plaintiff to demonstrate that defendant's articulated reason was not the actual reason, but rather a pretext for discrimination. Simpson v. Kay Jewelers, 142 F.3d 639, 644 (3d Cir. 1998).

To establish a prima facie case in an ADEA matter a plaintiff must show that he: (1) is a member of the protected class (i.e. he is at least 40 years of age); (2) is qualified for the position; (3) suffered an adverse employment decision; and (4) in the case of demotion or discharge, was replaced by a sufficiently younger person to create an inference of age discrimination. Simpson, supra.

Plaintiff claims, in the alternative, that he may

maintain a claim of discrimination under the ADEA if he demonstrates by a preponderance of the evidence that age was considered and impacted upon the employer's decision making. This type of claim requires a "mixed-motives analysis".

On June 9, 2003, by unanimous decision in Desert Palace, Inc. v. Costa, 539 U.S. ___, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), the United States Supreme Court eliminated the requirement of direct evidence of discrimination in order for a plaintiff to proceed on a mixed-motives theory. Prior to Desert Palace a plaintiff could only proceed under a mixed-motives analysis if he provided direct evidence of discrimination. See Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (O'Connor, J., concurring). As a result of the change in the law enunciated in Desert Palace, district courts around the country have wrestled with how to apply the decision within the existing framework of McDonnell Douglas.

The burden-shifting analysis articulated in McDonnell Douglas provided courts with a systematic way to analyze the entire spectrum of discrimination claims (gender, race, age, disability, and so forth). To the contrary, prior to Desert Palace the analysis of a mixed-motive claim was far more ambiguous. For example, courts have found that the mixed-motive standard is overall more generous to plaintiff than the pretext

analysis. However, there is a heightened evidentiary burden at the onset of a mixed-motive case, as compared with the McDonnell Douglas prima-facie analysis. See Overall v. Dunham, No. Civ.A. 02-1628, 2003 U.S. Dist. LEXIS 23892 at *17 (E.D. Pa. Dec.19, 2003); Campetti v. Career Education Corporation, No. Civ.A. 02-1349, 2003 U.S. Dist. LEXIS 12202 at *7 (E.D. Pa. June 25, 2003).

Specifically, employees were previously required to offer stronger evidence in a mixed-motive theory than that which was needed to establish the first prong of a McDonnell Douglas analysis. See Weston-Smith v. Cooley Dickinson Hospital, Inc., 282 F.3d 60, 64 (1st Cir. 2002). In the past, to warrant a mixed-motive analysis at the summary judgment stage, a plaintiff was required to "to produce a 'smoking gun' or at least a 'thick cloud of smoke' to support his allegations of discriminatory treatment." Raskin v. The Wyatt Company, 125 F.3d 55, 60-61 (2d Cir. 1997). Thus, the pre-Desert Palace mixed-motive analysis at the summary judgment stage was an inexact science.

Since the Supreme Court's decision in Desert Palace, two lines of decision have emerged. In Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987 (D. Minn. 2003), United States District Court Judge Paul A. Magnuson predicted the demise of the McDonnell Douglas burden-shifting analysis and advocated a "same decision test" in place of McDonnell Douglas. The same decision

test requires plaintiff to demonstrate that an impermissible consideration was a motivating factor in the employer's adverse employment decision. Thereafter, defendant must assert as an affirmative defense that it would have taken the adverse employment action absent the impermissible consideration.

Alternatively, in Dunbar v. Pepsi-Cola General Bottlers of Iowa, 285 F. Supp. 2d 1180 (N.D. Iowa 2003), Chief United States District Court Judge Mark W. Bennett advocates modifying McDonnell Douglas in light of Desert Palace. In Dunbar the court split the third element of the burden-shifting analysis to accommodate both pretext and mixed-motive cases. In a pretext case, step three requires plaintiff to prove by a preponderance of the evidence that defendant's articulated reason is not true but is instead a pretext for discrimination. In a mixed-motive case, step three requires that defendant's reason for the adverse employment action, while true, is only one of the reasons for its conduct, and that another motivating factor is plaintiff's protected characteristic. 285 F. Supp. 2d at 1198.

If plaintiff prevails in a mixed-motive analysis, but defendant is able to prove that it would have taken the same action in the absence of the of the impermissible motivating factor, then plaintiff's remedies are limited to injunctive relief, attorneys' fees and costs. Otherwise, plaintiff will be able to receive monetary damages as well. Id. For the following

reasons, we adopt the test set forth in Dunbar.

On December 2, 2003 the United States Supreme Court issued its unanimous[6] decision in Raytheon Company v. Hernandez, ___ U.S. ___, 124 S.Ct 513, 157 L.Ed.2d 357 (2003). In that case the Supreme Court applied the McDonnell Douglas framework to a post-Desert Palace case, and indeed, did not mention Desert Palace in its Opinion. Thus, contrary to the district court's determination in Dare, we conclude that McDonnell Douglas is still valid precedent. Moreover, we find persuasive the comprehensive analysis and reasoning of the district court in Dunbar. Thus, we apply the modified McDonnell Douglas test enunciated in Dunbar to the facts of the within matter.

Application to the Facts

The ADEA makes it unlawful for an employer to discharge, or otherwise discriminate against, an individual with regard to compensation and other terms and conditions of employment on the basis of age. 29 U.S.C. § 623(a)(1). The ADEA protects persons forty years or older. 29 U.S.C. § 631.

As noted above, initially plaintiff must establish a prima facie case of discrimination by showing that he; (1) is a member of the protected class (i.e. is at least 40 years of age); (2) is qualified for the position; (3) suffered an adverse

[6] Justice Souter took no part in the decision and Justice Breyer took no part in the consideration or decision of the case.

employment decision; and (4) in the case of demotion or discharge, was replaced by a sufficiently younger person to create an inference of age discrimination. Simpson, supra.

Plaintiff was 47 years old at the time of his termination. Thus, he satisfies the first factor. Moreover, defendant does not dispute that plaintiff's qualifications. Hence, he satisfies the second factor. Next, plaintiff suffered an adverse employment action because he was forced to resign. Therefore, plaintiff satisfies the third factor. However, for the following reasons, we conclude plaintiff fails to satisfy the fourth prong of the prima facie test.

Plaintiff concedes that he was replaced by Gordon Smith, a 44-year-old man who was approximately two years and nine months younger than plaintiff. Plaintiff contends that this age gap is enough to satisfy his burden of showing that he was replaced by a sufficiently younger person to create an inference of age discrimination. In support of his contention, plaintiff relies on the decision in Nembhard v. Memorial Sloan-Kettering Cancer Center, 918 F. Supp. 784 (S.D.N.Y. 1996), aff'd 104 F.3d 353 (2d Cir. 1996).

On the other hand, defendants contend that it is generally accepted as a matter of law that a six or seven year difference is not significant at any position or age. Bernard v. Beth Energy Mines, Inc., 837 F. Supp. 714, 717 (W.D. Pa. 1993),

aff'd 31 F.3d 1170 (3d Cir. 1994). For the following reasons we agree with defendants.

The caselaw in this Circuit consistently holds that an age gap of less than five years is, as a matter of law, insufficient to establish fourth element of the prima facie test. Reap v. Continental Casualty Company, No. Civ.A. 99-1239, 2002 U.S. Dist LEXIS 13845 (D. N.J. June 28, 2002); Martin v. Healthcare Business Resources, No. Civ.A. 00-3244, 2002 U.S. Dist. LEXIS 5117 (E.D. Pa. Mar.26, 2002); Gutkrecht v. SmithKline Beecham Clinical Labs, 950 F. Supp. 667, 672 (E.D. Pa. 1996); Bernard, supra.

Based upon the caselaw on point in this district and Circuit, we conclude, as a matter of law, that two years and nine months is not a sufficient age difference for plaintiff to satisfy his burden of demonstrating that he was replaced by a sufficiently younger person to create an inference of age discrimination.

Accordingly, because we conclude that plaintiff fails to establish a prima facie case under McDonnell Douglas, we grant defendant's motion for summary judgment on Count I of plaintiff's Amended Complaint.

Violation of the Pennsylvania Whistleblower Law

In Count II of plaintiff's Amended Complaint he seeks recovery under the Pennsylvania Whistleblower Law.[7] Specifically, plaintiff contends that the request for his resignation on August 22, 2001 was in retaliation for his good faith report of the improper administration of the City's EMS services. More specifically, plaintiff asserts that he was asked to resign because of the two instances in which he spoke to the press. In one of the instances (the July 14, 2001 article) plaintiff contends he spoke to the press after making a good faith report to the Board of Health about the EMS department's failure to comply with the Health Bureau's written standards, in particular, those which require certain levels of rapid response to all emergency calls.

Defendants contend that plaintiff does not qualify under the Whistleblower Law because plaintiff is not an employee as defined under the law. Moreover, defendants contend that because plaintiff did not produce any evidence of either waste or wrongdoing, he cannot prove his cause of action. For the following reasons, we agree with defendant in part, disagree in part and grant defendants' motion for summary judgment on Count II of plaintiff's Amended Complaint.

---

[7] Act of December 12, 1986, P.L. 1559, No. 169, §§ 1-8, as amended, 43 P.S. §§ 1421-1428.

Section 1423(a) of the Pennsylvania Whistleblower Law[8] provides:

> No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

43 P.S. § 1423(a). The definitions of "employee", "waste" and "wrongdoing" contained in Section 1422[9] are pertinent to this discussion.

Employee is defined as: "A person who performs a service for wages or other renumeration under a contract of hire, written or oral, express or implied, for a public body." 43 P.S. § 1422.

Waste is defined as: "An employer's conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from Commonwealth or political subdivision sources." 43 P.S. § 1422.

Wrongdoing is defined as: "A violation which is not of a merely technical or minimal nature of a Federal or State

---

[8] Act of December 12, 1986, P.L. 1559, No. 169, § 3(a), as amended, 43 P.S. § 1423(a).

[9] Act of December 12, 1986, P.L. 1559, No. 169, § 2, as amended, 43 P.S. § 1422.

statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer. 43 P.S. § 1422.

Initially, defendants contend that under the definition of employee stated above, plaintiff does not come under the definition because he has no contract with the City of Bethlehem. For the following reasons, we disagree.

It is firmly established that Pennsylvania is an at-will employment jurisdiction. McLaughlin v. Gastrointestinal Specialists, Inc., 561 Pa. 307, 750 A.2d 283 (2000). Defendant contends that plaintiff does not fall under the definition of an employee. However, defendant's position belies the employer/employee relationship in the at-will employment context; specifically, that there is an implied employment contract upon the terms that the employer may discharge the employee at any time with or without cause, and the employee may leave his employment at any time.

Thus, there is an implied contract between the parties in this case. To hold otherwise would abrogate the language of Pennsylvania Whistleblower Law as it relates to almost any employee of any state, county, city, township or subdivision of an agency in this Commonwealth. Accordingly, we conclude that plaintiff is an employee for purposes of the Whistleblower Law.

In his Amended Complaint, plaintiff contends that he

was terminated for making a good faith report to the Board of Health. However, in his response to defendants' motion for summary judgment, plaintiff fails to cite any specific provision of a "Federal or State statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer" 43 P.S. § 1422, about which he allegedly reported in good faith. Moreover, plaintiff has not identified any "employer's conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from Commonwealth or political subdivision sources", 43 P.S. § 1422, about which he reported.

In applying the standard of review for summary judgment to the record facts of this case, plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Ridgewood, supra. By failing to present any competent evidence, (i.e. a specific Board of Health regulation he asserts was violated or any argument in his brief on the issue of waste) plaintiff merely rests on the allegations of the pleadings, which is impermissible.

Accordingly, because plaintiff failed to produce evidence to support his claims of alleged waste and wrongdoing, we grant defendants' motion for summary judgment on Count II of

plaintiff's Amended Complaint.

Plaintiff's Claim of Breach of an Implied Contract

Count III of plaintiff's Amended Complaint asserts a state law cause of action for breach of an implied contract. Specifically, plaintiff contends that the City issued a Personnel Manual which creates an implied contract that abrogates the at-will employment doctrine in Pennsylvania. Plaintiff asserts that the Personnel Manual provides for progressive discipline which he was not afforded in this matter.

Plaintiff further contends that the Personnel Manual does not contain a disclaimer indicating that it is not to be construed as a contract of employment. Plaintiff asserts that Pennsylvania law is clear that the provisions of a personnel manual or employee handbook can constitute a unilateral offer of employment which the employee accepts by continuing to perform his duties. Plaintiff further asserts that as Director of EMS he was required to provide progressive discipline to his subordinates and that he assumed that the same protections applied to him.

In support of his contentions, plaintiff relies on the decision of the Superior Court of Pennsylvania in Bauer v. Pottsville Area Emergency Medical Services, Inc., 758 A.2d 1265 (Pa. Super. 2000). In addition, plaintiff avers that this issue was previously decided by Judge Hutton in his October 16, 2002

Memorandum and Order and is the law of the case. Moreover, plaintiff contends that this exact Personnel Manual was reviewed by our colleague United States District Judge Petrese Tucker in the case of Donchez v. City of Bethlehem, No. Civ.A. 02-8460 (E.D. Pa. May 15, 2003) and that Judge Tucker ruled that the personnel manual could be construed as creating an implied contract of employment.

Initially, the City contends that as a political subdivision, it is not empowered to create an implied contract that supplants the at-will employment doctrine in Pennsylvania. In addition, if the court determines that the City is empowered to create such an implied contract, it has not specifically abrogated the at-will doctrine in any provision contained in its Personnel Manual. For the following reasons, we agree with defendant City of Bethlehem.

As a general rule, municipal employees in Pennsylvania are at-will employees. Stumpp v. Stroudsburg Municipal Authority, 540 Pa. 391, 658 A.2d 333 (1995). Therefore, municipal employees accept employment subject to the possibility of summary removal by the municipal employer for any reason or no reason at all. Ballas v. City of Reading, No. Civ.A. 00-2943, 2001 U.S. Dist. LEXIS 657 (E.D. Pa. Jan. 25, 2001); Scott v. Philadelphia Parking Authority, 402 Pa. 151, 166 A.2d 278 (1961).

The City does not have the power to enter into

contracts, express or implied, written or oral, which contract away the right of summary dismissal absent express enabling legislation. Stumpp, supra; Scott, supra. "Tenure in public employment, in the sense of having a claim to employment which precludes dismissal on a summary basis is, where it exists, a matter of legislative grace." Scott, 402 Pa. at 154, 166 A.2d at 281.

Plaintiff contends that we should follow the decision of the Superior Court of Pennsylvania in Bauer which held that a employee handbook could be enforceable against an employer if a reasonable person in the employee's position would interpret the provisions as evidence that the employer would supplant the at-will employment doctrine. For the following reasons, we find Bauer inapplicable to this case.

Initially, we note that Bauer did not deal with a municipal employer. Thus, the Superior Court was not presented with the question here: can the City as a municipal employer abrogate the employment at-will doctrine absent specific enabling legislation? We conclude it cannot.

If the Pennsylvania Supreme Court has not addressed a precise issue, a prediction must be made taking into consideration "relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state

would decide the issue at hand." Nationwide Mutual Insurance Company v. Buffetta, 230 F.3d 634, 637 (3d. Cir. 2000) (citation omitted). "The opinions of intermediate state courts are 'not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court in the state would decide otherwise.'" 230 F.3d at 637 citing West v. American Telephone and Telegraph Co., 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139 (1940).

In this case, neither party cites any decision authored by the Supreme Court of Pennsylvania. The Superior Court's Bauer decision is not directly on point with regard to the factual circumstances here (a municipal employer versus a private employer). Therefore, we conclude that the Bauer decision is not controlling.

The City can choose to employ its progressive discipline policy or not with regard to at-will employees. The Personnel Manual does not create any rights for at-will employees, because absent enabling legislation, the City has no authority to bind itself. Where a municipality contracts for tenured employment in the absence of enabling legislation, the contract is invalid and unenforceable. Scott, supra.

Based upon well-settled precedent of the Supreme Court of Pennsylvania we determine that the City's policy of

progressive discipline, as it relates to at-will employees[10] is nothing more than advisory and predict that the Supreme Court of Pennsylvania would similarly find.

Finally, because the summary judgment stage of a proceeding is a different stage of the proceeding than a motion to dismiss, we find unpersuasive plaintiff's contention that Judge Hutton's October 16, 2002 Memorandum and Order is the law of the case. At summary judgment, the court must do more than just address whether plaintiff has set forth a set of facts consistent with the allegations from which he could obtain relief. Rather, plaintiff must come forward with evidence that presents material issues of fact from which a jury could conclude that plaintiff is entitled to relief.

Because we conclude defendant is not empowered to enter into the implied contract that plaintiff asserts exists, defendant could not have breached that contract. We note that this issue was not specifically addressed by Judge Hutton because defendant did not raise the issue at the motion to dismiss stage of the proceeding. That did not preclude defendant from raising the issue at the summary judgment stage.

Moreover, Judge Tucker's decision in Donchez was also decided on a motion to dismiss. There is no indication that the

[10] We note that certain City employees may have contract rights as civil service employees or other contract rights that the Legislature has approved. However, plaintiff does not assert, nor is there any evidence to support a finding, that plaintiff was anything other than an at-will employee.

City raised the issue of capacity to create an implied contract in that case. Thus, we conclude that Donchez is not instructive on the issue presently before the court.

Accordingly, we grant summary judgment in favor of defendants on Count III of plaintiff's Complaint.

Plaintiff's Claim of First Amendment Retaliation

In his October 16, 2002 Memorandum and Opinion Judge Hutton determined that Count IV of plaintiff's Amended Complaint set forth a claim for First Amendment retaliation, through the Fourteenth Amendment, pursuant to 42 U.S.C. § 1983. However, at the summary judgment stage, plaintiff must establish the existence of each element on which he bears the burden of proof. Watson, supra. For the following reasons, we conclude that there are material issues of fact which preclude the grant of summary judgment on Count IV.

In assessing plaintiff's claim for retaliation we must apply a three-step, burden shifting analysis. Baldassare v. New Jersey, 250 F.3d 188, 194 (3d Cir. 2001). Initially, plaintiff must show that he engaged in conduct or speech which is protected by the First Amendment. Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d Cir. 1995). Next, "plaintiff must show that defendant responded with retaliation, and that the protected activity was a substantial or motivating factor in the alleged retalitory action." Ballas, 2001 U.S. Dist. LEXIS 657 at *21.

Finally, defendant may defeat plaintiff's claim by demonstrating by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. Watters, 55 F.3d at 892.

Reviewing plaintiff's claim, we note that defendant's only contention is that there is a lack of causation because plaintiff's discussions with newspaper reporters and the subsequent request for his resignation on August 22, 2001 are not sufficiently close in time to suggest a causal connection between plaintiff's statements to the press and the request for his resignation. For the following reasons, we disagree with defendants and deny their motion for summary judgment on Count IV of plaintiff's Amended Complaint.

Initially, we agree that the statements made by plaintiff in 1999 are too far removed. However, the comments made by plaintiff on July 14, 2001 are close enough to his resignation to warrant scrutiny.

Plaintiff contends that after the initial newspaper article in October 1999, he was directed not to comment to the press. After the July 2001 comments he was advised that the City administration, including Mayor Cunningham, was very upset about his comments to the press. Indeed, defendant Grubb authored a letter to Mayor Cunningham two days after the July 14, 2001 newspaper article explaining that the situation at EMS was not as

dire as reported in the newspaper.[11]

A review of the Exhibits I and K attached in support of defendants' motion indicate that soon after plaintiff spoke to the press on each occasion, the City, through either defendant Grubb or Director of Human Resources Jean A. Zweifel, began soliciting comments on plaintiff's performance from the people in his department. Specifically, on November 9, 1999, Jean Zweifel sent out an evaluation form to the full-time personnel of the EMS division seeking comment on the policies, procedures and operations of the EMS department.[12]

In addition, it appears that after the July 14, 2002 article, defendant Grubb began soliciting comments from EMS personnel regarding plaintiff.[13] The reasonable inference in favor of plaintiff is that defendants were attempting to fabricate a reason to terminate him as a pretext to retaliate for his comments to the press.

We conclude that, there is evidence, taken in the light most favorable to plaintiff, a reasonable jury could conclude from Exhibits I and K that the request for plaintiff's resignation was in retaliation for his speaking to the press. Because it appears that defendant engaged in a course of conduct

---

[11] Exhibit D to plaintiff's Amended Complaint.

[12] Exhibit I in support of defendants' motion.

[13] Exhibit K in support of defendants' motion.

that was quite similar in both instances, we conclude that evidence of the October 1999 incident is relevant to the City's conduct in the July 2001 incident, despite the passage of nearly two years between those incidents.

Accordingly, we deny defendants' motion for summary judgment on Count IV of plaintiffs' Amended Complaint.

Qualified Immunity of Dana Grubb

In Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) the United States Supreme Court observed that governmental officials performing discretionary functions are generally shielded from liability from civil damages where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

The court must consider two questions as a matter of law: (1) taken in the light most favorable to plaintiff, do the facts show that defendant Grubb's conduct violated a known constitutional right of plaintiff?; and (2) was the right clearly established--meaning were the contours of the right "sufficiently clear that a reasonable official would understand that what he was doing violates that right." Saucier v. Katz, 533 U.S. 194, 201-202, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272, 281-282 (2001).

In this case, plaintiff contends that defendant Grubb played a significant role in the request for his resignation.

Specifically, Grubb collected the alleged evidence that was used as the basis for plaintiff's forced resignation. In addition, Mr. Grubb was at the meeting where plaintiff's resignation was requested. Finally, plaintiff contends that the request for his resignation was in retaliation for his comments to the press.

In Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) the United States Supreme Court stated:

> It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech.
>
> . . .
>
> The determination whether a public employer has properly discharged an employee for engaging in speech requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."
>
> . . .
>
> "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."

483 U.S. at 384-385, 107 S.Ct. at 2896-2897, 97 L.Ed.2d at 324-326. (Internal citations omitted). Thus, for the following reasons, we conclude that plaintiff's comments to the press constitute a matter of public concern and that the right was sufficiently clear that defendant Grubb should have understood that retaliating against plaintiff by requesting his resignation would violate plaintiff's First Amendment rights.

Plaintiff's comments about the situation at EMS clearly involve matters of public concern. The response time and ability of an EMS to be properly staffed to respond to emergencies are the type of information which raises awareness of potential threats to the public health and safety of the community at large. Charvat v. Eastern Ohio Regional Wastewater Authority, 246 F.3d 607, 617-618 (6th Cir. 2001). The citizens of the City of Bethlehem rely on the services provided by the EMS every day. The employees of the EMS constantly deal with life-and-death situations. Thus, we conclude plaintiff's comments to the press raise a matter of public concern, and Dana Grubb's alleged role in requesting plaintiff's resignation in retaliation for those comments violated plaintiff's First Amendment constitutional rights.

In addition, the matters involved in Rankin are not new or novel legal principles. The Supreme Court's decision in Rankin is over 15 years old. Thus, we conclude that this is an issue that is well-settled and sufficiently clear such that defendant Grubb should have known, as an upper level administrator in City government, that he was not permitted to violate plaintiff's protected First Amendment right to speak publically about alleged problems in the EMS department by retaliation in the form of requesting his resignation or terminating him for that speech. We conclude that viewing the

evidence in the light most favorable to plaintiff, a reasonable jury could conclude that is what happened in this case.

Accordingly, defendant Dana Grubb is not entitled to qualified immunity in this case.

CONCLUSION

For all the foregoing reasons, we grant in part and deny in part Defendants, City of Bethlehem and Dana B. Grubb's Motion for Summary Judgment.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID LLOYD,	)	
	)	Civil Action
Plaintiff	)	No. 02-CV-00830
	)	
vs.	)	
	)	
CITY OF BETHLEHEM and	)	
DANA B. GRUBB,	)	
	)	
Defendants	)	

O R D E R

NOW, this 1st day of March, 2004, upon consideration of Defendants, City of Bethlehem and Dana B. Grubb's Motion for Summary Judgment filed August 15, 2003; upon consideration of Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment filed September 18, 2003; upon consideration of the briefs of the parties; upon consideration of the pleadings, exhibits, depositions and record papers; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that defendant's motion for summary judgment is granted in part and denied in part.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is granted concerning Counts I, II and III of plaintiff's

Amended Complaint.

IT IS FURTHER ORDERED that Counts I, II and III are dismissed from plaintiff's Amended Complaint filed May 24, 2002.

IT IS FURTHER ORDERED that in all other respects defendants' motion for summary judgment is denied.

BY THE COURT:

_____
James Knoll Gardner
United States District Judge